

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOROTHY REED,

No. C 07-3198 CW

Plaintiff,

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT OR
REMAND AND GRANTING DEFENDANT'S
CROSS-MOTION FOR SUMMARY
JUDGMENT

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

Plaintiff Dorothy Reed has filed a motion for summary judgment or, in the alternative, remand to the Commissioner of the Social Security Administration (SSA) for further proceedings. Defendant Michael J. Astrue, in his capacity as Commissioner of the SSA, opposes the motion and cross-moves for summary judgment.¹ Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion and GRANTS Defendant's cross-motion for summary judgment.

BACKGROUND

¹ Plaintiff has not submitted an opposition to Defendant's cross-motion or a reply to Defendant's opposition.

1 I. Procedural History

2 On October 22, 2002, Plaintiff filed an application for
3 Disability Insurance Benefits under Title II of the Social Security
4 Act. Plaintiff alleges that she became disabled on June 14, 2002,
5 due to carpal tunnel syndrome, acute neck pain and depression.²
6 Plaintiff's date last insured (DLI) is December 31, 2005. On March
7 14, 2003, her claim was denied. On July 21, 2003, Plaintiff filed
8 a request for reconsideration, which was denied on December 18,
9 2003. On December 4, 2004, a hearing was held before an
10 Administrative Law Judge (ALJ), at which Plaintiff appeared and was
11 represented by counsel. On June 13, 2005, the ALJ issued an
12 opinion finding that Plaintiff was not disabled within the meaning
13 of the Act because she could perform the full range of light work
14 as defined by the Medical-Vocational Guidelines (Grids).

15 On June 7, 2006, Plaintiff filed a request with the Appeals
16 Council for review of the ALJ's decision. Although Plaintiff did
17 not timely file the request for review, the Appeals Council
18 accepted as "good cause" for the delay the fact that she and her
19 attorney had not received copies of the hearing decision. On March
20 6, 2007, Plaintiff's attorney, Cynthia Starkey, sent the Appeals
21 Council Plaintiff's updated medical documents. The Council
22 incorporated these documents into the record. After considering
23 the updated record, the Appeals Council, on April 13, 2007, denied
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25 ² Plaintiff alleged in her original disability application
26 that she suffered from depression. However, the
27 Administrative Law Judge (ALJ)'s decision does not mention
28 Plaintiff's depression, and Plaintiff does not discuss this
omission in her motion. Because it appears that this issue
is not in dispute, the Court will not address it.

1 Plaintiff's request for review, finding that there was no abuse of
2 discretion, error of law, lack of substantial evidence or
3 introduction of new or material evidence.

4 On May 5, 2007, Plaintiff initiated the present action for
5 judicial review under 42 U.S.C. § 405(g), seeking summary judgment
6 or remand to the Commissioner.

7 II. Factual History

8 A. Plaintiff's Age, Education and Work Experience

9 Plaintiff was born on October 6, 1956, and was forty-six years
10 old when she filed for Disability Benefits. (Transcript (TR) 73).
11 There are inconsistencies in the record regarding Plaintiff's level
12 of education and marital status. At her hearing, Plaintiff
13 testified to completing high school plus three years of college.
14 (Tr 340). However, at her psychological evaluation, Plaintiff
15 stated that she had finished just eleven years of school. (Tr
16 155). Plaintiff stated at her psychological evaluation that she
17 has never been married (Tr 156), but stated at her neurological
18 evaluation that she was divorced. (Tr 203).

19 Plaintiff has worked as a customer service representative,
20 mail sorter, linen room worker, packer and, most recently, as an
21 at-home care provider. (Tr 133). During her most recent
22 employment, Plaintiff was required to lift patients weighing over
23 one hundred pounds up to five times a day. (Tr 134). On June 14,
24 2002, Plaintiff tripped on a patient's wheelchair and broke her
25 fall with her right hand. (Tr 192). That same day, she went to the
26 San Joaquin General Hospital emergency room, where she had x-rays
27 taken. (Tr 193). Emergency room physicians suggested that she
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1 wear a carpal tunnel splint temporarily. (Tr 192).

2 Following this incident, Plaintiff filed a workers'
3 compensation claim, and received some compensation for a limited
4 time. (Tr 342-43). Plaintiff has been unemployed since June,
5 2002, and is no longer receiving workers' compensation or pension
6 benefits. (Tr 342). However, she does receive public assistance.
7 (Id.)

8 B. Plaintiff's Medical History

9 1. Carpal Tunnel Syndrome

10 Plaintiff reported to her neurological evaluator that her
11 carpal tunnel symptoms began three to four years before the June,
12 2002 incident. (Tr 202). The summary of the neurological report
13 refers to a 2000 nerve conduction study, which showed bilateral
14 carpal tunnel syndrome. (Id.) However, the medical reports
15 documenting this diagnosis are missing from the record. The first
16 document in the record alluding to Plaintiff's hand pain is a
17 January 7, 2002 progress report from the San Joaquin General
18 Hospital orthopedic clinic. (Tr 196). In this report, a clinic
19 physician recommended that Plaintiff treat the "pain [in] both
20 hands," by wearing a carpal tunnel splint and taking Motrin. (Id.)

21 At a later medical exam at the San Mateo Medical Center,
22 Plaintiff informed the doctor that the pain from her carpal tunnel
23 syndrome worsened following the June, 2002 accident. (Tr 316).
24 She began physical therapy on August 21, 2002, and the San Joaquin
25 Hospital progress notes indicate that she made "good progress."
26 (Tr 182). However, on May 29, 2003, her treating doctor at San
27 Joaquin Hospital, Dr. Sabna Thoppil, found that she was temporarily
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1 incapacitated from May, 2002 to July, 2004, because she was unable
2 to lift, push, or pull more than ten pounds at a time. (Tr 181).
3 A medical report from the San Mateo Medical Center notes that the
4 results of a November, 2003 electromyography (EMG) test on
5 Plaintiff's wrist muscles were consistent with bilateral carpal
6 tunnel syndrome. (Tr 316). The actual report of this test is
7 missing from the record.

8 On November 6, 2003, neurologist Dr. Rebecca Jordan, a
9 Department of Social Services consulting physician, examined
10 Plaintiff and found that her left hand grip was twenty-five,
11 twenty, twenty pounds and her right hand grip was twenty, twenty,
12 twenty pounds. (Tr 205). Dr. Jordan opined that Plaintiff could
13 lift and carry twenty-five pounds occasionally and ten pounds
14 frequently, that she had limited feeling in both hands, and that
15 both hands were capable of ordinary handling and use of push-pull
16 devices. (Tr 206). Dr. Jordan recommended that Plaintiff "limit
17 keyboard work and other such repetitive hand movements with either
18 hand." (Tr 206).

19 On December 5, 2003, a Disability Determination Service (DDS)
20 consulting physician reviewed Plaintiff's medical records and
21 determined that she could lift twenty pounds occasionally and ten
22 pounds frequently. (Tr 210). The DDS physician also concluded
23 that Plaintiff had an unlimited ability to push, pull and reach
24 with her left hand, that she could frequently push, pull, and reach
25 with her right hand, and that she could frequently handle, finger
26 and feel objects with both hands. (Tr 210, 212).

27 On August, 19, 2004, Dr. Jagdeep Mehrook, one of Plaintiff's
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1 treating physicians from San Joaquin Hospital, filled out a
2 "Complete Medical Report of Plaintiff's Physical and Mental Work-
3 Related Impairments." (Tr 243). In the report, Dr. Mehrok checked
4 boxes indicating that Plaintiff's symptoms limited her ability to
5 lift and carry objects to only ten pounds occasionally and that her
6 ability to grasp, manipulate, reach, handle, and push/pull objects
7 was limited to occasional exertions. (Tr 244-45).

8 Plaintiff's medication records show that she has been
9 prescribed Piroxicam and Naproxen, drugs that are commonly used to
10 treat pain and inflammation due to carpal tunnel syndrome. (Tr
11 287, 83); Physician's Desk Reference 2164, 2725 (62nd ed. 2008).

12 2. Neck Pain

13 At the November 6, 2003 neurological examination, Plaintiff
14 informed Dr. Jordan that she had developed acute neck pain after
15 the June, 2002 accident. (Tr 202). She stated that after she
16 slipped and fell at a Shell gas station on July 18, 2002, the pain
17 in the right side of her neck and shoulder worsened. (Tr 191).

18 As noted above, Plaintiff began physical therapy treatment in
19 August, 2002. (Tr 182). On October 10, 2002, Plaintiff visited
20 her physician, Dr. Thoppil, of the family practice at San Joaquin
21 General Hospital, complaining of severe right shoulder pain,
22 dizziness and spasms in her neck. (Tr 186). Later, Dr. Jordan
23 noted in her November 6, 2003 neurological report that Plaintiff
24 complained of "neck pain . . . radiating to the right shoulder
25 [which is] aggravated by certain positions while sleeping and
26 turning the neck." (Tr 202). She also noted that Plaintiff
27 complained of headaches, but found that "this seems to be an
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1 extension or radiation of the neck pain." (Id.) Dr. Jordan found
2 a decreased range of motion and tenderness in the midline of the
3 right paraspinous region. (Tr 204). However, she did not find any
4 gross deformity or spasm in Plaintiff's neck. (Id.) She also did
5 not find that Plaintiff's neck pain affected her ability to sit or
6 stand for up to six hours in an eight hour workday. (Id. at 206)

7 The record shows that Plaintiff has been prescribed Vicodin
8 for the pain in her neck and shoulder, and an anti-spastic
9 medication called Baclofen. (Tr 99, 148); Physician's Desk
10 Reference 510, 3332 (62nd ed. 2008).

11 C. Plaintiff's Statements

12 On November 11, 2002, Plaintiff completed an Exertional Daily
13 Activities Questionnaire. (Tr 117). In it, she described how her
14 alleged disability affected her daily life. (Id.) Plaintiff
15 stated that her "hand gave out" while she combed her hair, cut
16 vegetables and lifted pots. (Id.) She also described feeling pain
17 in her hands following these activities. (Id.) Plaintiff stated
18 that she was unable to push a grocery cart or lift the hood of her
19 car without assistance. (Tr 118). Although she said that she
20 could no longer do some activities she did prior to her injuries,
21 like skating, dancing and bike riding, she stated that she could
22 still drive to church and to the movies. (Tr 118-19). However,
23 she noted that her hand hurt and cramped when she drove, "no matter
24 where or [how] long." (Tr 118).

25 On February 9, 2003, Plaintiff was evaluated by psychiatrist
26 Dr. Andrea Bates. Plaintiff told Dr. Bates that she smoked
27 marijuana twenty-four hours a day, seven days a week. (Tr 156).
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1 When asked about her activities of daily living, Plaintiff answered
2 that she does household chores, shops, cooks, watches television
3 and works in puzzle books. She also stated that her hobbies
4 included flying kites and skating. (Id.) She told Dr. Bates that
5 sometimes she "may go in [her] car and drive, and just drive." (Tr
6 155).

7 At the hearing before the ALJ on May 20, 2005, Plaintiff
8 testified that her regular schedule consisted of driving three or
9 four times a week, walking up and down eight stairs to her
10 apartment two to three times a day, attending church services every
11 Sunday morning, shopping once a month, watching approximately six
12 hours of television a day, and working on a computer less than two
13 hours a week. (Tr 346-49). She also testified that she could not
14 sleep, that her hands "lock[ed] up and throb[bed] on me," her feet
15 "swell[ed] and they hurt," and the muscles in her neck tightened
16 and burned four to five times a day. (Tr 344-36). In order to
17 relieve these symptoms, Plaintiff testified that she rested her
18 hands every twenty minutes, dropped her head to relieve some of the
19 tension in her neck, elevated her feet for thirty minutes, two or
20 three times a day, and took prescription medication. She also
21 stated at her hearing that she smoked two marijuana cigarettes
22 every morning and night, in contrast to her earlier statement to
23 Dr. Bates that she smoked twenty-four hours a day, seven days a
24 week. Although she testified that the marijuana helped control her
25 pain, she also stated that she had been using marijuana for no
26 apparent medicinal purpose for approximately twelve or thirteen
27 years. (Tr 344-36).
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1 D. Third Party Statements

2 On November 11, 2002, Plaintiff's friend, Dyana Jones,
3 completed a Daily Activities Questionnaire, answering questions
4 regarding her observations of Plaintiff's daily activities. (Tr
5 120). Ms. Jones stated that Plaintiff had trouble sleeping at
6 night, required assistance when she went shopping, and spent most
7 of her time "alone watching tv or reading or sleeping." (Tr 120-
8 21). She indicated that Plaintiff could still do all the household
9 chores, but that she took more time to complete each task. (Tr
10 121-22).

11 On August 18, 2003, Petina Reed, Plaintiff's niece, filled out
12 an Adult Function Report regarding Plaintiff's limitations. (Tr
13 87). Ms. Reed indicated that Plaintiff prepared food regularly,
14 though she often had to stop and rest due to pain in her hands.
15 (Tr 89). Ms. Reed also noted that Plaintiff had a difficult time
16 cleaning her house and lifting any object weighing over five
17 pounds. (Tr 90). Ms. Reed stated that Plaintiff could still take
18 half mile walks, go to church, watch television and visit her
19 family. (Tr 91-92).

20 III. The ALJ's Findings

21 After considering the record and Plaintiff's testimony at the
22 hearing, the ALJ found that Plaintiff had not been engaged in
23 substantial gainful activity since the alleged onset of her
24 disability, that her alleged impairments were "severe" but did not
25 meet one of the listed impairments in the Social Security Act, that
26 she could not perform any of her past work, and that she had the
27 Residual Functional Capacity (RFC) to perform the full range of
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1 light work. (Tr 26).

2 The ALJ relied on Dr. Jordan's³ finding that Plaintiff could
3 lift or carry up to twenty-five pounds occasionally and ten pounds
4 frequently, and could stand, walk or sit for six hours a day. (Tr
5 23). The ALJ also relied on Dr. Jordan's report to find that
6 Plaintiff could frequently push/pull with her right arm, had
7 unlimited use of her left arm for pushing/pulling, and could
8 frequently handle, finger and feel with both hands. (Id.) In
9 addition, the ALJ relied on the DDS consulting physician's
10 assessment that Plaintiff could lift or carry twenty pounds
11 occasionally and ten pounds frequently. (Id.)

12 The ALJ accorded little weight to the opinions of Drs. Thoppil
13 and Mehrok, who found that Plaintiff's bilateral carpal tunnel
14 syndrome limited her ability to lift more than ten pounds at a
15 time, and her ability to grasp, perform fine manipulation, reach,
16 handle, and push/pull to only occasional exertions. (Tr 23-24).
17 The ALJ also accorded little weight to Plaintiff's subjective
18 complaints regarding the severity of her symptoms. (Tr 24). The
19 ALJ based this finding on the fact that these opinions and
20 testimony were inconsistent with the medical record, and with
21 Plaintiff's daily activities and hobbies, which included taking
22 care of her personal needs, running errands, shopping, cooking,
23 driving, playing solitaire, solving magazine puzzles, flying kites
24 and skating. (Id.) The ALJ also found that Plaintiff's testimony
25 was not credible, given inconsistencies in her statements regarding
26 her level of education, marital status, and the frequency of her
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28 ³ The ALJ refers to Dr. Jordan as Dr. Morgan in his opinion.

1 marijuana use. (Id.) Moreover, the ALJ found that Plaintiff had
2 "not submitted sufficient objective evidence, such as nerve
3 conduction tests, to support her allegations." (Id.)

4 The ALJ used the Medical-Vocational Guidelines (Grids) to
5 determine whether Plaintiff could perform "substantially all" of
6 the primary strength demands required by work at any level of
7 exertion. (Tr 25). The ALJ's analysis of Plaintiff's RFC was that
8 she could perform substantially all of the requirements of light
9 work, which, according to 20 C.F.R § 404.1567, may include frequent
10 pulling/pushing, a "good deal of walking or standing," and "lifting
11 no more than 20 pounds at a time with frequent lifting or carrying
12 of objects weighing up to 10 pounds." (Tr 25-26). The ALJ
13 concluded that, because there are a significant number of jobs in
14 the national economy that Plaintiff could perform, she was not
15 "disabled" under the Social Security Act. (Id.)

16 IV. Medical Documents Submitted After ALJ Opinion Issued

17 In March, 2007, Plaintiff submitted updated medical records to
18 the Appeals Council. As noted above, the Appeals Council accepted
19 the additional evidence and incorporated it into the record. These
20 documents show that in May, 2005, five months following Plaintiff's
21 hearing before the ALJ, Dr. Howard Belfer from the San Mateo
22 Medical Center examined Plaintiff and found positive Tinel's sign⁴
23 over the median nerves on Plaintiff's hands, and decreased
24 sensation and strength in all her fingers. (Tr 303). On August
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27 ⁴ Tinel's sign is a tingling sensation that a patient may
28 feel at the site of a compressed or injured nerve. The
Merck Manual of Diagnosis and Therapy, 334, 339 (Robert
Berkow et al. eds., Merck Research Laboratories 16th ed.
1992).

1 31, 2005, Plaintiff underwent a nerve conduction study, and was
2 diagnosed with moderate carpal tunnel syndrome and moderate
3 bilateral ulnar neuropathy at the level of the elbow, more
4 pronounced in Plaintiff's non-dominant left side. (Tr 307).

5 The records also indicate that in March, 2006, Dr. Marcel
6 Nguyen from the San Mateo Medical Center administered an injection
7 of cortisone in Plaintiff's hands.⁵ (Tr 291). The cortisone
8 injection provided only temporary relief, and on May 3, 2006, Dr.
9 Nguyen recommended that Plaintiff undergo surgery. (Tr 258). On
10 February 6, 2007, Plaintiff had carpal tunnel release and ulnar
11 transposition surgeries on her left hand. (Tr 260). Plaintiff was
12 scheduled to have the carpal tunnel surgeries on her right hand on
13 March 20, 2007. (Id.)

14 LEGAL STANDARD

15 I. Overturning a Denial of Benefits

16 A court cannot set aside a denial of benefits unless the ALJ's
17 findings are based upon legal error or are not supported by
18 substantial evidence in the record as a whole. 42 U.S.C. § 405(g);
19 Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989); Martinez v.
20 Heckler, 807 F.2d 771, 772 (9th Cir. 1986). Substantial evidence
21 is such relevant evidence as a reasonable mind might accept as
22 adequate to support a conclusion. Richardson v. Perales, 402 U.S.
23 389, 401 (1971); Orteza v. Shalala, 50 F.3d 748, 749 (9th Cir.
24 1995). It is more than a scintilla but less than a preponderance.
25 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975).
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27 ⁵ Cortisone is a hormone drug that is regularly used to
28 treat inflammatory conditions. Black's Medical Dictionary,
166 (51st ed. 2006).

1 To determine whether substantial evidence exists to support
2 the ALJ's decision, a court reviews the record as a whole, not just
3 the evidence supporting the decision of the ALJ. Walker v.
4 Matthews, 546 F.2d 814, 818 (9th Cir. 1976). A court may not
5 affirm the ALJ's decision simply by isolating a specific quantum of
6 supporting evidence. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir.
7 1989). In short, a court must weigh the evidence that supports the
8 ALJ's conclusions and that which does not. Martinez, 807 F.2d at
9 772.

10 If there is substantial evidence to support the decision of
11 the ALJ, even when the evidence is susceptible to more than one
12 rational interpretation, it is well-settled that the decision must
13 be upheld. Gallant v. Heckler, 753 F.2d 1450, 1453 (9th Cir.
14 1984). If supported by substantial evidence, the findings of the
15 ALJ as to any fact will be conclusive. 42 U.S.C. § 405(g).

16 Ordinarily, the court reviews only the ALJ's decision because,
17 upon denial of review by the Appeals Council, the ALJ's decision
18 becomes the final agency decision. 20 C.F.R. § 416.1481. However,
19 where the claimant submits evidence after the ALJ's decision, and
20 the Appeals Council specifically considers that evidence, the court
21 considers the rulings of both the ALJ and the Appeals Council, and
22 the record for review includes the new evidence. Ramirez v.
23 Shalala, 8 F.3d 1449, 1451-52 (9th Cir. 1993) (providing that the
24 Appeals Council shall evaluate the entire record, including new
25 relevant evidence); see also Harman v. Apfel, 211 F.3d 1172, 1180
26 (9th Cir. 2000); Bates v. Sullivan, 894 F.2d 1059, 1063-64 (9th
27 Cir. 1990).

28 II. Establishing Disability Under the Social Security Act

1 Under the Social Security Act, "disability" is defined as the
2 inability to engage in any substantial gainful activity by reason
3 of any medically determinable physical or mental impairment which
4 can be expected to result in death or which has lasted or can be
5 expected to last for a continuous period of not less than twelve
6 months. 42 U.S.C. § 423 (d) (1) (A). The impairment must be so
7 severe that the claimant "is not only unable to do his previous
8 work but cannot . . . engage in any other kind of substantial
9 gainful work which exists in the national economy." 42 U.S.C.
10 § 423 (d) (2) (A). In addition, the impairment must result "from
11 anatomical, physiological, or psychological abnormalities which are
12 demonstrable by medically acceptable clinical and laboratory
13 diagnostic techniques." 42 U.S.C. § 423 (d) (3).

14 To determine whether a claimant is disabled within the meaning
15 of the Social Security Act, the Social Security regulations set out
16 a five-step sequential process. 20 C.F.R. § 404.1520 (b) - (f);
17 Baxter v. Sullivan, 923 F.2d 1391, 1395 (9th Cir. 1991). The
18 burden of proof is on the claimant in steps one through four.
19 Sanchez v. Secretary of Health and Human Servs., 812 F.2d 509, 511
20 (9th Cir. 1987). In step one, the claimant must show that he or
21 she is not currently engaged in "substantial gainful activity." 20
22 C.F.R. § 404.1520 (b). If the claimant is engaged in such
23 activities, he or she is not disabled. Id. In step two, the
24 claimant must show that he or she has a "medically severe
25 impairment or combination of impairments" that significantly limits
26 his or her ability to do basic work. 20 C.F.R. § 404.1520 (c);
27 Bowen v. Yuckert, 482 U.S. 137, 140 (1987); Smolen v. Chater, 80
28 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have

1 such a medically severe impairment, he or she is not disabled.
2 Otherwise, the process continues to step three for a determination
3 of whether the impairment meets or equals a "listed" impairment
4 which the regulations acknowledge to be so severe as to preclude
5 substantial gainful activity. Yuckert, 482 U.S. at 141; 20 C.F.R.
6 § 404.1520(d); 20 C.F.R. § 404, Subpt. P, App. 1. If this
7 requirement is met, the claimant is conclusively presumed disabled;
8 if not, the evaluation proceeds to step four.

9 At step four, it must be determined whether the claimant can
10 still perform "past relevant work." Yuckert, 482 U.S. at 141; 20
11 C.F.R. § 404.1520(e). If the claimant can perform such work, he or
12 she is not disabled. If the claimant meets the burden of
13 establishing an inability to perform prior work, the burden of
14 proof shifts to the Commissioner at step five. At step five, the
15 Commissioner must show that the claimant can perform other
16 substantial gainful work that exists in the national economy when
17 considering the claimant's age, education and work experience.
18 Yuckert, 482 U.S. at 142; 20 C.F.R. § 1520(g).

19 DISCUSSION

20 The parties agree that Plaintiff has not engaged in
21 substantial gainful employment since the onset date of her
22 impairments, that Plaintiff's bilateral carpal tunnel syndrome and
23 neck pain are "severe," that Plaintiff's medically determinable
24 impairments do not meet or medically equal any one of the listed
25 impairments in Appendix 1, Subpart P, Regulation No. 4, and that
26 Plaintiff cannot perform any of her past work. (Tr 26). The
27 relevant question here is whether Defendant has met his burden of
28 demonstrating that Plaintiff can perform other substantial gainful

1 work that exists in the national economy.

2 Plaintiff presents four issues for review. First, she
3 challenges the ALJ's RFC determination as unsupported by
4 substantial evidence. Second, Plaintiff contends that the ALJ
5 improperly discounted her treating physicians' reports. Third,
6 Plaintiff argues that the ALJ improperly rejected her statements
7 and the statements of third parties as lacking credibility. And
8 finally, Plaintiff asserts that the ALJ's reliance on the Medical
9 Vocational Guidelines was improper.

10 I. Residual Functional Capacity (RFC) Determination

11 Plaintiff argues that the record as a whole does not support
12 the ALJ's finding that her RFC allows the "unlimited use of her
13 left upper extremity for pushing and/or pulling," the ability to
14 "lift/carry 20 pounds occasionally and 10 pounds frequently, . . .
15 frequently push and/or pull with her right upper extremity, . . .
16 [and] frequently handle, finger, and feel with her bilateral upper
17 extremities." (Tr 26). She points to new medical evidence, such
18 as the 2005 nerve conduction test, to support her assertion that
19 she suffers from disabling bilateral carpal tunnel syndrome. (Tr
20 316, 243). Plaintiff contends, at the very least, that the 2007
21 carpal tunnel release and ulnar transposition surgeries on her left
22 hand establish that she does not have "unlimited use of her left
23 upper extremity for pushing and/or pulling." (Tr 260).

24 The Court finds, however, that even in light of the new
25 medical records, there is substantial evidence to support the ALJ's
26 conclusions. Dr. Jordan, a medical specialist who examined
27 Plaintiff in November, 2003, found that she could lift or carry up
28 to twenty-five pounds occasionally and ten pounds frequently, and

1 could stand, walk or sit for six hours. (Tr 206). Moreover, the
2 DDS physician who reviewed all of Plaintiff's medical records in
3 December, 2003, found that she had an unlimited ability to push,
4 pull and reach with her left hand, that she could frequently push,
5 pull, and reach with her right hand, and that she could frequently
6 handle, finger and feel objects with both hands. (Tr 210, 212).
7 Finally, Plaintiff testified at her hearing before the ALJ that her
8 disabilities did not prevent her from driving, walking up and down
9 stairs, attending church services, shopping, cooking or working on
10 a computer. (Tr 346-49). This testimony, consistent with the
11 medical opinions describing Plaintiff's physical limitations,
12 constitutes substantial evidence supporting the ALJ's
13 determination.

14 The Court also finds that the Appeals Council's conclusion
15 that Plaintiff's new medical records did not constitute "new and
16 material evidence" was reasonable. Although the new records
17 confirm that Plaintiff suffered from moderate bilateral carpal
18 tunnel syndrome during the relevant time period, they do not
19 support a finding that this condition was disabling. There is no
20 mention in the new records that the condition limited Plaintiff's
21 ability to lift, carry, push or pull, or had any other effect on
22 her physical capabilities. Moreover, as Defendant argues,
23 Plaintiff's 2007 hand surgeries are not determinative, because they
24 took place more than one year after Plaintiff's DLI. See Morgan v.
25 Sullivan, 945 F.2d 1079, 1080 (9th Cir. 1991) (holding that the
26 claimant bears the burden of establishing the presence of a
27 disability on or before the relevant DLI). In fact, the surgeries
28 lend support to the ALJ's determination, because they demonstrate

1 that Plaintiff's condition was not permanently disabling, but
2 treatable. Therefore, remand is not warranted on this basis.

3 II. Treating Physician's Report

4 Plaintiff also contests the ALJ's decision to "accord little
5 weight" to the opinion of her treating physician, Dr. Mehrok,
6 without providing any "good reasons" for doing so. (Tr 24).

7 "Generally, [the Commissioner] give[s] more weight to opinions
8 from . . . treating sources, since these sources are likely to be
9 the medical professionals more able to provide a detailed,
10 longitudinal picture of . . . [claimant's] medical impairment(s) and
11 may bring a unique perspective to the medical evidence that cannot
12 be obtained from . . . reports of individual examinations, such as
13 consultative examinations or brief hospitalizations." 20 C.F.R.
14 § 404.1527(d)(2). For this reason, if an ALJ chooses to reject a
15 treating physician's opinion, he or she must provide "good reasons"
16 for doing so. 20 C.F.R. § 404.1527(d)(1).

17 Factors that the Commissioner takes into account in deciding
18 whether to grant a treating physician's opinion controlling weight
19 include: consistency with the record as a whole, the amount of
20 medical evidence supporting the physician's opinion, "particularly
21 medical signs and laboratory findings," the nature and extent of
22 the treatment relationship and the frequency of examinations. 20
23 C.F.R. § 404.1527(d)(1-4). In addition, the ALJ need not accept a
24 treating physician's opinion which is "brief and conclusionary in
25 form with little in the way of clinical findings to support [its]
26 conclusion." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
27 1989). Finally, the ALJ may discount a treating physician's
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1 opinion if it contradicts the results of an independent examination
2 conducted by a non-treating physician. See Andrews v. Shalala, 53
3 F.3d 1035, 1041 (9th Cir. 1995) ("Where the opinion of a treating
4 physician is contradicted, and the opinion of a nontreating source
5 is based on independent clinical findings that differ from those of
6 the treating physician, the opinion of the non-treating physician
7 may itself be substantial evidence; it is then solely the province
8 of the ALJ to resolve the conflict.").

9
10 The ALJ's decision to accord little weight to Dr. Mehrok's
11 testimony was based on his finding that Dr. Mehrok's opinion was
12 "not consistent with the medical evidence [and] the claimant's
13 activities of daily living and hobbies." (Tr 24). Dr. Jordan, a
14 non-treating physician who examined Plaintiff, concluded that
15 Plaintiff could carry up to twenty-five pounds occasionally and ten
16 pounds frequently, directly contradicting Dr. Mehrok's conclusion
17 that Plaintiff could carry only ten pounds occasionally. Because
18 Dr. Jordan's findings were based on a direct medical examination of
19 Plaintiff's motor skills, they are sufficient to constitute
20 "substantial evidence." See Andrews, 53 F.3d at 1041. Moreover,
21 because Dr. Mehrok's report is a brief check-mark form which
22 provides little explanation of the clinical findings used to
23 support its conclusions, the ALJ was not required to accept it as
24 controlling evidence. In addition, there is no evidence in the
25 record that demonstrates that Dr. Mehrok and Plaintiff had an
26 ongoing doctor-patient relationship. Therefore, the Court finds
27 that the ALJ's decision to discount Dr. Mehrok's medical opinion
28

1 was not error.

2 III. Plaintiff's Symptom Reporting and Third Party Statements

3 Plaintiff contends that the ALJ's decision to discount her
4 statements regarding the severity of her symptoms was not based on
5 "clear and convincing reasons."

6 For an ALJ to reject the claimant's complaints, he or she must
7 provide "specific, cogent reasons for the disbelief." Rashad v.
8 Sullivan, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant
9 produces medical evidence of an underlying impairment, the
10 Commissioner may not discredit the claimant's testimony as to
11 subjective symptoms merely because they are unsupported by
12 objective evidence. Bunnell v. Sullivan, 947 F.2d 341, 343 (9th
13 Cir. 1991) (en banc); see also Cotton v. Bowen, 799 F.2d 1403, 1407
14 (9th Cir. 1986) ("it is improper as a matter of law to discredit
15 excess pain testimony solely on the ground that it is not fully
16 corroborated by objective medical findings").

17 Unless there is affirmative evidence showing that the claimant
18 is malingering, the Commissioner's reasons for rejecting the
19 claimant's testimony must be "clear and convincing." Swenson v.
20 Sullivan, 876 F.2d 683, 687 (9th Cir. 1989). General findings are
21 insufficient; rather, the ALJ must identify what testimony is not
22 credible and what evidence undermines the claimant's complaints.
23 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993); Varney v.
24 Secretary of Health and Human Services, 846 F.2d 581, 584 (9th Cir.
25 1988). In determining whether a plaintiff's testimony concerning
26 the severity of her symptoms is credible, the ALJ may consider "the
27
28

1 claimant's daily activities [and] inconsistencies in testimony."
2 Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (per curiam).

3 Plaintiff's inconsistent statements regarding the frequency of
4 her marijuana use, her educational level and her marital status
5 provide "clear and convincing" reasons for discounting her
6 testimony. Although Plaintiff's use of the expression "twenty-four
7 hours a day, seven days a week," to describe her drug habit does
8 not necessarily contradict the more realistic testimony that she
9 smokes marijuana twice a day, her testimony that she smoked
10 marijuana to control her pain is inconsistent with her testimony
11 that she had been smoking for thirteen years, before there was any
12 evidence that she suffered from carpal tunnel syndrome. (Tr 156,
13 345). This inconsistency, taken together with Plaintiff's
14 inconsistent statements regarding her level of education and
15 marital status, undermines her credibility.
16

17 In addition, the inconsistencies between Plaintiff's stated
18 daily activities and her symptom-reporting provide another "clear
19 and convincing reason" for discounting her testimony. The record
20 shows that Plaintiff drives to doctor's appointments and to the
21 store three to four times per week, goes up and down a flight of
22 eight steps two to three times per day, attends church on Sundays,
23 shops once a month, uses a computer for email and to play
24 solitaire, does household chores, runs errands, cooks, and may even
25 fly kites and skate. (Tr 24). Plaintiff also stated to Dr. Bates
26 that she sometimes gets into her car and "just drives," although
27 she wrote in her Exertional Daily Activities Questionnaire that her
28

1 hand hurt and cramped when she drove, "no matter where or [how]
2 long." (Tr 118, 155). Moreover, although Plaintiff testified that
3 her hands would "lock up and throb" during these activities, she
4 did not state that the pain was debilitating, or that her
5 medication or marijuana use was ineffective in controlling her
6 symptoms. (Tr 344-36). Therefore, the Court finds that the ALJ
7 has provided sufficiently clear and convincing reasons for
8 rejecting Plaintiff's testimony of her physical limitations.
9

10 Plaintiff also argues that the ALJ failed sufficiently to
11 consider the testimony of third parties, because he did not
12 "acknowledge . . . the [specific] contents of . . . third party
13 statements. (Docket no. 13 at 9). An ALJ must consider lay
14 testimony as to a claimant's symptoms in making a disability
15 determination. Stout v. Commissioner of Social Sec., 454 F.3d
16 1050, 1053 (9th Cir. 2006). This testimony "cannot be disregarded
17 without comment." Id. "If the ALJ wishes to discount the
18 testimony of lay witnesses, he must give reasons that are germane
19 to each witness." Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir.
20 1993).
21

22 Here, the ALJ did not say that he discounted the testimony of
23 third parties. In fact, he stated in his opinion that he
24 "considered the . . . third party statements and concludes that the
25 claimant's impairments could reasonably be expected to produce some
26 of the pain alleged." (Tr 24). The ALJ is not required to
27 acknowledge the specific content of a third party statement if he
28

1 considered that statement and gave it its due weight. Thus, remand
2 is not warranted on this ground.

3 IV. Medical-Vocational Guidelines (Grids)

4 Plaintiff argues that the ALJ's use of the Grids was improper
5 because she cannot meet substantially all of the strength demands
6 of light or sedentary work.

7
8 The Grids are administrative tools that the Commissioner may
9 use at step five of the disability evaluation. Burkhart v. Bowen,
10 856 F.2d 1335, 1340 (9th Cir. 1988). Based on age, education, work
11 experience, and "exertional capacity," the Grids determine the
12 employability of claimants with "substantially uniform levels of
13 impairment." Id. However, the ALJ may rely on the Grids only when
14 they "accurately and completely describe the claimant's abilities
15 and limitations." Id.; see also Tackett v. Apfel, 180 F.3d 1094,
16 1102 (9th Cir. 1999). That is, the Grids may be used to direct an
17 unfavorable decision only if the claimant has the exertional RFC to
18 meet substantially all of the strength demands required by work at
19 the given level of exertion. Social Security Ruling 83-10.

20 According to 20 C.F.R § 404.1567, light work may include
21 frequent pulling/pushing and "lifting no more than 20 pounds at a
22 time with frequent lifting or carrying of objects weighing up to 10
23 pounds." 20 C.F.R § 404.1567(b). As stated above, the ALJ's
24 finding that Plaintiff can frequently pull and push and lift
25 objects weighing up to twenty pounds was based on substantial
26 evidence in the record. Because there is sufficient evidence
27 demonstrating that Plaintiff can meet substantially all the
28 strength demands required by light work, the ALJ's use of the Grids

1 to direct an unfavorable decision was proper.

2 Plaintiff also argues that the ALJ's use of the Grids was
3 improper because the loss of dexterity in her hands prevented her
4 from performing substantially all of the requirements for sedentary
5 work. As the Social Security Act explains and the ALJ noted, "If
6 someone can do light work, we determine that he or she can also do
7 sedentary work, unless there are additional limiting factors such
8 as loss of fine dexterity or inability to sit for long periods of
9 time." 20 C.F.R § 404.1567(b). However, the ALJ did not address
10 whether or not Plaintiff had any of these limiting factors, nor did
11 he conclude that she could perform substantially all of the
12 requirements for sedentary work. His finding that there are a
13 significant number of jobs in the national economy that Plaintiff
14 can perform was based entirely on his finding that she could
15 perform substantially all the requirements of light work.

16 CONCLUSION

17 For the foregoing reasons, Defendant's cross-motion for
18 summary judgment is GRANTED (Docket no. 16) and Plaintiff's motion
19 for summary judgment/remand is DENIED (Docket no. 13). Judgment
20 shall enter accordingly. The parties shall bear their own costs.

21 IT IS SO ORDERED.

22 Dated: 8/22/08



23 CLAUDIA WILKEN
24 United States District Judge
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